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In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners,*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents.*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners,*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents.*

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF 67 CATHOLIC THEOLOGIANS AND ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY STORES, INC., AND CONESTOGA WOOD SPECIALTIES CORP.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 67 Catholic theologians and ethicists. A complete list of *amici*, with their qualifications and institutional affiliations for identification purposes, is included in the Addendum to this Brief. *Amici* believe that the regulatory interpretation of 42 U.S.C. § 300gg-13(a) that requires employers to provide insurance coverage for abortifacient drugs and devices, elective sterilization, and contraceptive services ("the Mandate") violates religious freedom. The religious objections to the Mandate of the employers in these cases are well-founded and shared by many Catholic employers, who will be affected by the disposition of this case. Catholic moral and theological principles, which are shared by many other Christian traditions, indicate that providing health insurance coverage for these objectionable services could cause objecting employers to become unacceptably complicit in actions forbidden by their religious faith.

Amici Curiae file this Brief with the consent of all parties.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for Respondents Hobby Lobby Stores, Inc., et al., in No. 13-354, have provided a written letter of consent to counsel for *amici curiae*, and counsel for all other parties have filed blanket notices of consent with the Court.

SUMMARY OF THE ARGUMENT

The Mandate imposes a substantial burden on the religious freedom of Catholic employers and other religious believers who object on religious grounds to providing insurance coverage for abortifacients, elective sterilization, and/or contraceptives, and for education and counseling designed to encourage the use of such services. This Court must defer to religious employers' interpretation of their own religion, and must accept their conclusion that providing the objectionable insurance coverage would violate their religious principles, unless that conclusion is so bizarre or so clearly nonreligious in motivation as to warrant extreme judicial skepticism.

No such showing is possible in this case, because the employers' unwillingness *to* comply with the Mandate reflects an eminently reasonable application of Christian religious principles. The Catholic theological tradition, in common with related Christian traditions, has well-developed concepts used to assess whether a believer may "cooperate in"—*i.e.*, facilitate or assist—the religiously objectionable action of another person. Several objective criteria, commonly invoked by the Catholic theological tradition, determine whether such cooperation would cause the believer to share in moral responsibility for that action.

Under these criteria, the Mandate thrusts Catholic and other religious employers into a "perfect storm" of moral complicity in the forbidden actions. It requires employers to cooperate in (1)

gravely objectionable actions, (2) by making a substantial and direct causal contribution to those actions, (3) when such actions are less likely to happen without the employers' contribution, (4) through the provision of funds that are specifically designated in advance for the sole purpose of paying for the forbidden actions, (5) in violation of authoritative guidance from the Catholic bishops to avoid close cooperation in such actions, and all (6) without a proportionate reason to justify material cooperation.

First, in cases of material cooperation, the Catholic tradition considers the gravity of the wrongdoing in which the believer may cooperate. Graver wrongdoing requires a more serious reason to justify material cooperation. By mandating coverage for abortifacients, the Mandate requires employers to cooperate in the destruction of human life, which is very gravely objectionable to Catholics and many other Christians. Catholic teaching, in particular, also treats elective sterilization and contraception as seriously wrongful actions. In addition, instructing or encouraging someone else to commit a wrongful act is itself a grave moral wrong—*i.e.*, "scandal"—under Catholic doctrine. By mandating coverage for contraceptive "education and counseling," the Mandate requires employers to finance counseling programs designed to instruct and encourage others to use abortifacients and contraceptives. Forcing Catholic and other religiously objecting employers to cooperate in such counseling programs presents a distinct and equally serious violation of their religious conscience.

Second, in cases of material cooperation, many theologians in the Catholic tradition consider how substantially and directly the believer contributes to the performance of the forbidden action. The more substantial and direct one's involvement, the greater one's share in the moral responsibility for that action. The Mandate requires very substantial and direct participation by employers in actions forbidden by their religious principles. It requires them to finance a large proportion of the cost—both of the services themselves, and of the education and counseling designed to promote such services. The employers' involvement in these objectionable actions is triggered by only one intervening cause, namely the decision of the employee who seeks the objectionable services. By contrast, the causal contribution of an individual taxpayer to any particular objectionable government program is far less substantial and direct than the participation in forbidden actions required by the Mandate.

Third, many Catholic theologians consider whether the objectionable action would have happened anyway without the believer's participation, *i.e.*, whether the believer is a "necessary" or "essential" cause of the objectionable action. It is particularly problematic for a believer knowingly to assist in the destruction of innocent human life when such destruction would not occur without the believer's contribution. The Mandate creates the possibility that religious employers may become necessary or essential causes of such actions. Though contraceptives, including abortifacients, are widely available at relatively low cost from other sources, the Mandate forces the employer to provide

insurance that covers the entire cost of such services, which the Government intends to increase usage of them. Moreover, the Mandate is very likely to make employers necessary causes for education programs designed to encourage use of abortifacients and contraceptives.

Fourth, some Catholic theologians consider whether the cooperator is providing the third party with a means that is specifically designed for use in the forbidden action. Providing another person with certificates or coupons to authorize the performance of a morally objectionable action typically makes one morally complicit in that action. The Mandate requires religious employers to provide health insurance coverage for the morally objectionable services, and for contraceptive education and counseling. This is analogous to providing certificates or coupons for abortifacients and contraceptives.

Fifth, the many specifically Catholic employers who are affected by the Mandate have an additional reason for concern. On such matters of faith and morals, Catholic employers are called to obey the teaching authority of the Catholic bishops, who have uniformly condemned the Mandate, and who had already forbidden close cooperation in abortion and sterilization procedures prior to the Mandate.

Because providing the objectionable health coverage would involve substantial, direct, and potentially necessary cooperation in very gravely wrongful actions, including the foreseeable destruction of human life, Catholic and other

religiously objecting employers can reasonably conclude that no proportionate reason justifies material cooperation.

Because all these criteria are satisfied, it is eminently reasonable for a Catholic or other religiously objecting employer to conclude that the compliance with the Mandate would gravely burden their religious conscience by forcing them to become complicit in religiously forbidden actions.

ARGUMENT

I. Principles of Catholic Moral Theology Support the Claims of Religiously Objecting Employers That Compliance With the Mandate Would Make Them Complicit in Religiously Forbidden Actions.

In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), this Court stated that it would defer to a religious believer's interpretation of the dictates of his or her own religion unless the claim was "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. The judgment of many Catholic and other religious employers that compliance with the Mandate would violate their religious conscience is neither "bizarre" nor "clearly nonreligious in motivation." *Thomas*, 450 U.S. at 715. Rather, it reflects an eminently reasonable application of Christian religious principles, which have enjoyed particularly explicit examination and development in the Catholic theological tradition.

Theologians and ethicists in the Catholic tradition employ a well-developed set of concepts to analyze issues of complicity in the immoral actions of others. These concepts explain why so many Catholic employers have taken the same position as the employers in these cases. Such employers reasonably and sincerely draw a line against providing insurance coverage for abortifacients and contraceptives, while not objecting to other forms of less direct financial support for objectionable actions—such as paying federal taxes that support objectionable government programs, or paying cash to employees who may go on to use the money for objectionable purposes.

First, in ascertaining whether knowingly facilitating or contributing to someone else's forbidden actions is morally permissible, Catholic moral theology speaks of "cooperation" with the forbidden actions. "Cooperation," in this context, is understood broadly as "the participation of one agent in the activity of another agent to produce a particular effect or joint activity." Russell E. Smith, *The Principles of Cooperation in Catholic Thought*, *in* The Fetal Tissue Issue: Medical and Ethical Aspects 81, 84 (Peter J. Cataldo & Albert S. Moraczewski eds., 1994).

Next, the Catholic tradition draws a distinction between "formal" and "material" cooperation. "Formal" cooperation occurs when the believer, in cooperating, shares in the intention that the forbidden action be committed by the other party. *See* Orville N. Griese, *Catholic Identity in Health*

Care: Principles and Practice 387-88 (1987) ("Griese"); Germain Grisez, *The Way of the Lord Jesus, Vol. 3: Difficult Moral Questions* 872-73 (1997) ("Grisez"). "Formal cooperation always is morally unacceptable, because, by definition, it involves bad intending." Grisez, at 873. "Material" cooperation occurs when the believer foresees that his action will facilitate or assist the performance of the objectionable action by the third party, but does not share in the principal agent's intention to commit the action. Grisez, at 873; Griese, at 388. Material cooperation is sometimes permissible, and sometimes impermissible. To determine whether it is permissible, one must balance the good one hopes to achieve by cooperating against the nature of the bad action and the closeness of one's contribution to it. Grisez, at 876. A "proportionate reason"—*i.e.*, some good to be achieved that is significant enough to counterbalance the bad action and the closeness of one's complicity in it—is required to justify material cooperation in a forbidden action. Grisez, at 876; *accord* Gary Atkinson et al., *A Moral Evaluation of Contraception and Sterilization* 79-80 (1979) ("Atkinson").

Several objective criteria are frequently invoked in the Catholic theological tradition to determine whether cooperation in another's bad action is permissible. These criteria are supported by commonsense moral intuitions, and many have close parallels in the manner that our laws allocate legal responsibility. In this case, all of these criteria point in the same direction. Each one indicates that compliance with the Mandate could violate the religious conscience of Catholics and other objecting

employers by forcing them to assume an intolerable degree of complicity in forbidden actions.

These criteria include: (1) the gravity of the wrongdoing that the believer facilitates; (2) the magnitude and directness of the believer's causal contribution to that wrongdoing; (3) whether the wrongdoing would have occurred without the believer's cooperation, *i.e.*, whether the believer is a "necessary" or "essential" cause of the objectionable action; (4) whether there is a close fit between the means provided by the believer and the objectionable action; and (5) whether there is a specific directive from Church authorities forbidding the cooperation.

A. The Mandate Forces Employers To Cooperate In At Least Two Distinct Activities That Are Gravely Objectionable Under Catholic Doctrine.

The first criterion for assessing the permissibility of material cooperation is how grave or serious is the wrongdoing that the believer is assisting. The graver the wrongdoing, the more problematic is cooperation in that wrongdoing. In general, "the more serious the harm from the sin, the more significant must be the good sought to justify cooperation." Atkinson, at 80. A proportionately stronger justification is required "the graver ... the evil of the principal agent's act in itself," and "the graver ... is the harm which may be caused to third parties, especially the innocent," by the objectionable action. Bishop Anthony Fisher, O.P., *Cooperation in evil: understanding the issues*, *in* Cooperation, Complicity & Conscience: Problems in healthcare,

science, law, and public policy 27, 54 (Helen Watt ed., 2005) ("Fisher").

1. The Mandate requires employers to finance the use of abortifacients, contraceptives, and sterilizations, which are gravely objectionable to Catholics.

The Mandate requires employers to cooperate in actions that are gravely wrongful according to Catholic teachings. First, the Mandate requires employers to finance the use of abortifacients, contraceptives, and sterilizations, by paying for a large share of the premiums for insurance policies covering those services. Each of these actions is seriously wrongful under Catholic teachings.

First, under Catholic doctrine, the use of abortifacient drugs and devices is a moral wrong of the first order. The Catholic Church teaches that "[h]uman life must be respected and protected absolutely from the moment of conception." *Catechism of the Catholic Church* ¶ 2270 (1994) ("Catechism"). "From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." *Id.* Under Catholic doctrine, the destruction of innocent human life—including embryonic human life—is a violation of the Fifth Commandment, "Thou shalt not kill," and thus a serious moral wrong. *Id.* ¶ 1858. "Since it must be treated from conception as a person, the [human] embryo must be defended in its

integrity, cared for, and healed, as far as possible, like any other human being." *Id.* ¶ 2274.

The United States Conference of Catholic Bishops has authoritatively applied this teaching against destroying human life to Catholic health care providers:

> Abortion ... is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation.

United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* ¶ 45 (5th ed. 2009), *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf ("Directives").[2] Regardless of the Government's definition of "abortion," the Catholic faith views the destruction of a human embryo at any time after conception—including during "the interval between conception and implantation of the embryo," *id.*—as an abortion, and gravely wrongful. These views, moreover, are shared by many other

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[2] All internet citations were last visited January 24, 2014.

non-Catholic Christians, including the religious employers in these cases.

The Catholic Church also deems elective sterilization and contraception to be seriously wrongful. "[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible" is impermissible. Catechism ¶ 2370. "Any sterilization which ... has the sole immediate effect of rendering the generative faculty incapable of procreation ... remains absolutely forbidden according to the doctrine of the Church." Sacred Congregation for the Doctrine of the Faith, *Responses to Questions Concerning Sterilization in Catholic Hospitals (Quaecumque Sterilizatio)* ¶ 1 (March 13, 1975), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_en.html.

2. The Mandate requires employers to finance "education and counseling" that will instruct and encourage persons to use abortifacients and contraceptives.

The Mandate also requires religiously objecting employers, through their contribution to the employee health care plan, to finance "patient education and counseling" for their employees in the use of abortifacients and contraceptives. 77 Fed. Reg. 8724, 8725 (Feb. 15, 2012); *see also* 42 U.S.C. §

300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2013); Health Res. & Serv. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines/. In the report upon which the Mandate's contraceptive requirements are based, the Institute of Medicine made clear that the intended purpose of the contraceptive education and counseling requirement is to increase the use of contraceptives, including those that function as abortifacients:

> [S]tudies show that postpartum contraceptive counseling increases contraceptive use ..., that counseling increases method use among adolescents in family planning clinics, that counseling decreases nonuse of contraception in older women of reproductive age who do not want a future baby, and that counseling of adult women in primary care settings is associated with greater contraceptive use....

Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 107 (2011); *see also* Gina M. Secura et al., *The Contraceptive CHOICE Project: reducing barriers to long-acting reversible contraception*, Am. J. Obstetrics & Gynecology, Aug. 2010, at 115e.1, 115e.4 (attributing increased use of abortifacient contraceptive methods to increased patient education, among other factors). There can be no doubt that the Government-mandated "education and counseling" programs, which are financed by employer-provided health insurance

plans, will be designed to instruct and encourage women to use abortifacients and contraceptives. Whether or not such programs will actually be effective in promoting such usage, religiously objecting employers will be required to support such programs, contrary to their religious beliefs.

The Catholic tradition forbids "scandal," which in the theological context is defined as encouraging or exhorting other persons to engage in wrongdoing: "Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter." Catechism ¶ 2284. "Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged." *Id.* ¶ 2287. Teaching and educating others about how to perform wrongful actions is a particularly serious form of scandal. *Id.* ¶ 2285 ("Scandal is grave when given by those who by nature or office are obliged to teach and educate others.").

By compelling employers to finance a scheme that necessarily includes counseling and education in the use of abortifacients and contraceptives, the Mandate requires religiously objecting employers to cooperate in the grave moral wrong of scandal—*i.e.*, encouraging others to engage in wrongdoing—in addition to their cooperation in the grave moral wrong of their employees' actual use of abortifacients or contraceptives.

B. The Mandate Requires Employers To Make Substantial and Direct Contributions to Morally Objectionable Actions.

Second, in cases of material cooperation, many Catholic theologians consider the magnitude and directness of the believer's causal contribution to the forbidden action. This concept is often expressed by distinguishing between "proximate" and "remote" forms of cooperation. "'Proximate versus remote' refers to how closely ... cooperation is connected with the evil in some way but not as an instrument of its performance." Benedict M. Ashley, O.P. & Kevin D. O'Rourke, O.P., *Health Care Ethics: A Theological Analysis* 195 (4th ed. 1997). Because a more substantial and direct contribution to an objectionable action tends to increase one's share in the moral responsibility for that action, proximate material cooperation requires a greater justification than remote material cooperation. The permissibility of cooperation thus depends in part on "how closely connected with the sinful action are the circumstances in which there is cooperation." Atkinson, at 80. Conversely, "the more an institution is *causally removed* from the immoral procedure or activity, the more acceptable is its material cooperation" in that objectionable action. The Ethicists, The National Catholic Bioethics Center, *Cooperating with Non-Catholic Partners, in* Catholic Health Care Ethics: A Manual for Ethics Committees 27/1, 27/3 (Peter J. Cataldo & Albert S. Moraczewski eds., 2009) ("Manual").

To illustrate this principle, consider the case of a religious objector who opposes the death penalty. Each year, she pays her federal taxes, knowing that a portion of her tax money may ultimately be used by others to finance the federal death penalty. Because her own tax money makes, at most, a minuscule and indirect causal contribution to any particular execution, this would typically not trouble her conscience much. But suppose that one year, the government were to direct her to personally finance a large portion of the cost of the drugs for a lethal injection, instead of paying her taxes. She would presumably balk at doing this, even if she knew that the execution would proceed regardless of her participation. Her reluctance would arise from the commonsense intuition that she would be participating far more substantially and directly in the execution than she does by merely paying taxes, and that such close participation would cause her to share in moral responsibility for the execution.

In fact, this example is similar to the facts of *Thomas*. In *Thomas*, the religious objector "testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms—for example, as an employee of a raw material supplier or of a roll foundry," but that he could not in good conscience work directly in the manufacture of weapons. *Thomas*, 450 U.S. at 711. The Supreme Court held that this judgment was a valid exercise of religious liberty. *Id.* at 716.

In this case, the Mandate would require Catholic and other objecting employers to make a very

substantial and direct causal contribution to their employees' receipt of contraceptive counseling and use of abortifacients. First, under the Mandate, the employer must pay a very significant portion of the cost of the services. Because the Mandate requires that there is no cost-sharing at the time of purchase, *see* 42 U.S.C. § 300gg-13(a), the proportion of the cost financed by the employer is the proportion of the insurance premiums paid by the employer—on average, 82 percent of the premiums for employees with individual coverage, and 72 percent of the premiums for employees with family coverage. The Kaiser Family Foundation, *Employer Health Benefits 2012 Annual Survey: Summary of Findings* 1 (2012), http://kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/ (noting that these percentages have been "relatively unchanged over the past decade"). Thus, the monetary contribution required by the Mandate, in proportion to the total cost of the objectionable action, is many orders of magnitude greater than (for example) the contribution of an objecting Catholic taxpayer to any particular federal execution.

The employer's provision of health insurance is also a direct manner of cooperating in their employees' contraceptive counseling and use. Contrary to the suggestion of some district courts that the employer's contribution "might, after a series of independent decisions by health care providers and patients covered by [the employer's] plan, subsidize *someone else's* participation" in an objectionable activity, *see, e.g.*, *O'Brien v. U.S. Dep't of Health and Human Servs.*, No. 4:12-CV-476, 2012 U.S. Dist. LEXIS 140097, at *19 (E.D. Mo. Sept. 28,

2012), there is no lengthy chain of mediating decisions separating the employer from the morally objectionable activity in this case. All that is required is for one of the employees to decide to seek information about, or access to, contraceptive or abortifacient agents. With that single triggering decision, the Catholic employer would become complicit in a grave moral wrong. This complicity is not remote, like that of the objecting taxpayer whose contribution to a federal execution is mediated through decisions of Congress, prosecutors, judges, and criminal defendants. Rather, it is substantial and direct complicity, in that the employer directly supports the action, by paying for it. To be sure, the morally objectionable action is ultimately committed by someone else, but so it is in any case of complicity.

The cooperation required by the Mandate, therefore, is quite different from that in the taxpayer-funding cases on which the Government relies in its brief in its Opening Brief in *Hobby Lobby*. *See* Br. for the Pet'rs in No. 13-354, at 34-35 (citing *Tilton* v. *Richardson*, 403 U.S. 672 (1971) and *Board of Educ. v. Allen*, 392 U.S. 236 (1968)). In those cases, the financial contribution of each individual taxpayer to the allegedly objectionable programs contributed a miniscule fraction of the cost of the government's programs, and the programs would almost certainly have still occurred without that contribution. Under the Mandate, by contrast, the employer's contribution to the objectionable action is very substantial—the employer finances the large majority of the cost—and there is a real possibility that the objectionable action might not

take place at all without the employer's contribution. *See infra*, Part I.C.

C. The Mandate May Require Employers To Become "Necessary" or "Essential" Causes of Objectionable Actions.

Third, in weighing the material cooperator's degree of moral responsibility for the forbidden action of a third party, Catholic moral theologians consider whether the forbidden action would have happened anyway if the believer had not facilitated it. In the parlance of Catholic theology, one considers whether the believer is a "necessary" or "essential" contributor to the objectionable action. One important factor in assessing material cooperation is "how indispensable is the cooperation for the sinful action to occur." Atkinson, at 80. Cooperation is particularly problematic when one "participate[s] in the evil act by doing something necessary for the actual performance of the evil act," such that "one's action contributes to the active performance of the evil action so much so that the evil action could not be performed without the help of the cooperator." Benedict M. Ashley, O.P. et al., *Health Care Ethics: A Catholic Theological Analysis* 56 (5th ed. 2006); *see also* Manual, at 27/2 (stating that a Catholic hospital would be morally responsible when "immoral procedures would not be taking place but for the collaboration" of the hospital). A much stronger justification is required "[i]f forgoing the [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects." Grisez, at 882-83. "[T]he more difficult it would be for the principal

agent to proceed without the cooperator's involvement," the more serious the justification required to cooperate. Fisher, at 55.

For a religious employer of significant size, there is a reasonable possibility that compliance with the Mandate will cause an increase in the use of abortifacients, contraceptives, and elective sterilizations, which would not occur without the mandated coverage. And it is even more likely that it will cause an increase in the incidence of contraceptive "education and counseling," since such counseling can be provided to female patients of childbearing age even if (and perhaps especially if) they do not deliberately seek out contraceptive services. To be sure, abortifacients and other contraceptives are already widely available from other sources at relatively low cost, so it is not certain that the Mandate will produce a significant increase in contraceptive use. But it is a possibility, and increased usage is in fact the Government's aim in reducing the employee's out-of-pocket cost for the objectionable services to zero. *See* 75 Fed. Reg. 41,726, 41,733 (July 10, 2010); *cf. Baude v. Heath*, 538 F.3d 608, 614 (7th Cir. 2008) ("Anything that raises the cost of an activity will diminish the quantity").

To the extent the Mandate achieves its purpose, then, the Government threatens to force employers to become necessary and essential causes of acts of the destruction of innocent human life. And even if the Mandate fails to increase use of abortifacients and contraceptives, it will still likely compel

employers to become essential causes of encouraging contraceptive use through education and counseling.

D. The Mandate Requires Employers To Provide Funding Earmarked In Advance To Be Used For Objectionable Purposes.

Certain Catholic moral theologians also consider whether the means provided by the cooperator is directly ordered to, or specifically tailored for, use in the forbidden action, and they weigh the cooperator's responsibility more heavily when there is such a direct relationship. As one commentator puts it, the cooperator's moral complicity greatly increases where there is an "essential tie" or "intelligible link" between the cooperator's action and the wrongdoing. Melissa Moschella, The HHS Mandate and Judicial Theocracy (Jan. 3, 2013), http://www.thepublicdiscourse.com/2013/01/7403/ ("Moschella").

In cases where the manner of cooperation consists of *paying for* the forbidden action—such as this case—an "essential tie" or "intelligible link" exists when the cooperator provides the wrongdoer with a "certificate" to pay for the wrongful action:

> [P]aying a salary and providing insurance coverage for certain services are far from equivalent. The difference is analogous to the difference between giving cash to someone, and giving, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no

> essential tie between your gift and that particular use of it. In the latter case, you are giving a voucher for the procurement of a *specific and limited range* of goods or services; there is an intelligible link between your gift and the use to which the recipient might put it.

Id. (emphasis in original). In other words, one becomes complicit in wrongdoing when one provides a "gift certificate" or "voucher" to perform the wrongful action, *id.*—even if the wrongdoer would be able to perform the wrongful action without that assistance.

A related question about the permissibility of providing a certificate or voucher for the performance of a wrongful action arose in Germany in the late 1990s. In 1995, Germany legalized abortion during the first trimester, "provided that the woman had a certificate that she had attended ... an approved counseling center" before seeking the abortion. Fisher, at 46-47. The certificate of the counselor was required by law for the woman to receive an abortion. Certain German bishops, while condemning the abortion law, sought to have Catholic counselors participate in the state-approved counseling program. *Id.* at 47. These bishops anticipated that Catholic counselors would tend to dissuade women from having abortions, and that the participation of Catholic counselors would thus reduce the overall number of abortions. *Id.*

In 1998, Pope John Paul II authored a letter to the German bishops, calling on them to "take care that ... ecclesiastical institutions do not become co-responsible for the killing of innocent children" by issuing such counseling certificates that authorized women to receive abortions. *Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference* ¶ 4 (Jan. 11, 1998), *at* http://www.vatican.va/holy_father/john_paul_ii/letters/1998/documents/hf_jp-ii_let_19980111_bishop-germany_en.html ("Papal Letter"). Though he applauded the intentions and actions of the Catholic pregnancy counselors, *id.* ¶ 6, the Pope expressed grave concern that, by providing women with certificates that authorized the women to receive abortions, Catholic counselors "are involved in carrying out a law that leads to the killing of innocent human beings." *Id.* ¶ 7. Because such involvement made Catholics morally complicit in abortion, the Pope "urgently" exhorted the German bishops to ensure that the practice would cease. *Id.*

Likewise, under the Mandate, employers would become complicit in abortion by providing the equivalent of "certificates" or "vouchers" for employees to receive abortifacients. *See* Moschella. By providing insurance coverage for those services, religiously objecting employers would effectively be providing vouchers or coupons to cover the cost of such services. This action can quite reasonably be viewed as rendering them morally complicit in the act of abortion. Much like the Catholic counselors who issued "abortion certificates" in Germany, Catholic employers in this country could become, in the words of Pope John Paul II, "involved in carrying

out a law that leads to the killing of innocent human beings." Papal Letter ¶ 8.

E. Providing the Objectionable Insurance Coverage Would Require Catholic Employers To Disregard Guidance of the Catholic Bishops.

Furthermore, the many specifically Catholic employers affected by the Mandate have an additional reason for concern. For Catholics, the judgment of their bishops on religious matters of faith and morals is entitled to deference, respect, and obedience. The bishops are "authentic teachers, that is, teachers endowed with the authority of Christ, who preach the faith to the people entrusted to them, the faith to be believed and put into practice." Cathechism ¶ 2034. The Catholic's individual conscience "should take account of ... the authoritative teaching of the Magisterium on moral questions," and "[p]ersonal conscience and reason should not be set in opposition to the moral law or the Magisterium of the Church." *Id.* ¶ 2039. Specific guidance from the bishops on moral questions, therefore, is to be treated as highly persuasive by Catholic believers.

In this case, the United States Conference of Catholic Bishops has expressed "vigorous and united opposition" to the Mandate as infringing upon the religious freedom of Catholic employers. United States Conference of Catholic Bishops, Ad Hoc Committee for Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, http://www.usccb.org/issues-and-action/religious-

liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf. Moreover, prior to the promulgation of the Mandate, the Catholic bishops had already instructed that "Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization." Directives ¶ 70. The teaching of the Catholic bishops on this specific issue provides an additional compelling theological reason for Catholic employers to avoid the conduct compelled by the Mandate. Based on these statements, Catholic employers may reasonably infer that the Catholic bishops have determined that providing the objectionable health insurance coverage would be morally problematic under Catholic doctrine.

F. One May Reasonably Conclude That No Proportionate Reason Justifies the Substantial, Direct, and Necessary Cooperation in Grave Moral Wrongs Required by the Mandate.

As noted above, in certain cases of material cooperation, the Catholic tradition calls for the cooperator to consider whether there is a "proportionate reason" that might justify one's facilitation of another's wrongdoing. Grisez, at 876. As each of the factors discussed above is satisfied, however, an increasingly compelling proportionate reason is required to justify the cooperation. *See* Griese, at 400-01. Where, as here, all the factors discussed above are implicated, it becomes very reasonable to conclude that no proportionate reason

would justify the cooperation. This is particularly true where the wrongdoing includes the destruction of innocent human life, viewed as a moral wrong of the highest gravity by the Catholic faith. As discussed above, Pope John Paul II's letter to the German Bishops in 1998 reflected a similar judgment about the absence of proportionate reasons that might justify cooperation in abortion. In Germany, Catholics were participating in the abortion counseling program "in order to be able by goal-directed counseling to save many unborn babies from being killed." Papal Letter ¶ 6. According to the Pope, not even that vitally important purpose was sufficient to justify the grave evil of becoming "involved in carrying out a law that leads to the killing of innocent human beings." *Id.* ¶ 7. *See also* Griese, at 401-02 (noting that "it is difficult to suggest a reason which might justify" proximate and necessary "cooperation in an intrinsically evil procedure" such as abortion). Relatedly, due to the moral gravity of abortion, the Directives of the United States Conference of Catholic Bishops categorically forbid immediate material cooperation in abortion procedures. Directives ¶ 70. Thus, employers can very reasonably conclude that no proportionate reason would justify their provision of health insurance coverage for abortifacients, contraceptives, and sterilizations.

* * *

For these reasons, the Mandate places employers in the midst of a "perfect storm" of moral complicity in actions forbidden by the Catholic faith and other similarly grounded religions. It requires employers to cooperate in (1) actions that are very seriously

wrongful under Catholic teaching, (2) by making a very substantial and direct causal contribution to those actions, (3) in circumstances where it is possible that some of these wrongs would not otherwise occur, (4) by furnishing funding that is specifically designated in advance for the sole purpose of paying for the objectionable actions, (5) in the face of authoritative guidance from the Catholic bishops forbidding close cooperation in these wrongs, and all (6) without a proportionate reason to justify their cooperation. Thus, the judgment of many Catholic and other religiously objecting employers that the Mandate substantially burdens their religious freedom reflects an eminently reasonable application of theological principles.

CONCLUSION

For the reasons stated, *Amici* respectfully request that this Court hold that the Mandate imposes a substantial burden on the free exercise of religion by objecting employers.

Respectfully submitted,

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